IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6230 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

A'BAD MUNICIPAL COMMISSIONER

Versus

HIRALAL DAHYABHAI RATHOD

Appearance:

1. Special Civil Application No. 6230 of 1997

MR HS MUNSHAW for Petitioner No. 1

MR MB GANDHI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 19/10/2004

ORAL JUDGEMENT

Heard learned advocate Mr. Munshaw for the petitioner Corporation and Mr. M.B.Gandhi for the

respondent workman. In this petition under Article 227 of the Constitution of India, the petitioner has challenged the award made by the Labour Court, Ahmedabad in Reference (LCA) No. 81 of 1992 dated 21st April, 1997 wherein, in reformative measure, the labour court has granted reinstatement in favour of the respondent with continuity of service without back wages for the intervening period. Under the said award, the labour court has also imposed punishment of stoppage of two annual increments of the workman with future effect.

This petition was admitted by this Court on 28th August, 1997 and while admitting the petition, notice as to interim relief was issued by this court. Thereafter, this Court passed following interim order on 24th November, 1997 :

"Heard Mr. Munshaw for the petitioner and Mr. Gandhi for the respondent. This petition has already been admitted by my brother Calla, J. on 28th August, 1997 when he also issued notice as to interim relief. The respondent workman has filed a reply on the first returnable date placing on record that he is unemployed since the date of termination. In that view of the matter, the respondent will have to be paid his last drawn wages under the provisions of the Industrial Disputes Act, 1947.

2. The petitioner is pressing for the stay of the impugned award. Hence, the following order:

Interim stay of the impugned award on the respondent being paid his last drawn wages under section 17B of the ID Act. The impugned award is dated 21st April, 1997. It was published on 10.7.1997. The award states that it has to come into force within 30 days from the date of publication. Hence, the respondent will be paid his last drawn wages from 10th August, 1997 onwards. This is with a rider that the petitioner is at liberty to employ the respondent without prejudice until the matter is further heard in a post which will not involve any financial transactions. The matter to be placed on final hearing board on 9.2.1998. Mr. Munshaw states that the arrears will be cleared on or before 31st December, 1997 including the payment under section 17B of the Act for the month of December, 1997. The payment thereafter will be

made by the end of each subsequent month. "

Learned advocate Mr. Gandhi submits that in view of the award of reinstatement and also in view of the observations made by this Court in the interim order dated 24.11.1997, the respondent workman has been reinstated in service and at present, the respondent is in service with the Corporation.

Learned advocate Mr. Munshaw submits that it is a clear case of misappropriation, admitted by the workman and yet the labour court has granted reinstatement and it amounts to undue sympathy shown by the labour court. According to Mr. Munshaw, in such circumstances, in view of such facts of the case, the labour court ought not to have exercised the powers under section 11-A of the ID Act, 1947. He also submits that the labour court ought not to have granted reinstatement in favour of such a person who has committed serious misconduct of misappropriation. Except these submissions, no other submissions were made by the learned advocate Mr. Munshaw on behalf of the petitioner. No decisions were cited by the learned advocate Mr. Munshaw before this Court.

On the other hand, learned advocate Mr. Mahendrabhai Gandhi appearing for the respondent workman has submitted that because of the compelling circumstances and sickness of the wife of the respondent, he was in need of some amount for the medical treatment of his ailing wife and, therefore, since the workman was the victim of compelling circumstances, he was constrained to use the said amount for the treatment of his wife which was returned back by him to the corporation within some short period and, therefore, the labour court was right in exercising the powers under section 11A of the ID Act, 1947. He also submits that the labour court has also considered the compelling circumstances of the workman while passing the award and, therefore, over and above the refusal of the back wages for the intervening period, the labour court has also imposed punishment of stoppage of two increments with future effect and, therefore, the award made by the labour court is just and proper award. He also submits that after reinstatement of the workman in service pursuant to the interim order of this court, the respondent is working with the corporation since 1998 and more than six years have passed and no misconduct has thereafter been committed by the respondent which is also required to be taken into consideration by this Court. He further submits that the past record of the workman

was clean and it was also not even the case of the petitioner that the respondent had in past committed such similar type of misconduct or any other misconduct and all these aspects were kept in mind by the labour court while exercising powers under sec. 11A of the ID Act, 1947. He further submits that even if the misconduct has been admitted by the workman, then also, the labour court is having powers to consider the matter under Section 11A of the ID Act, 1947 while considering the other surrounding circumstances and the past record of the workman an can grant the relief as a reformative measure for giving one chance to show improvement. Thus, according to the submissions made by the learned advocate Mr. Gandhi for the workman, the award of reinstatement without back wages and with punishment of stoppage of two annual increments with future effect is quite just and proper and would require no interference of this Court under Article 227 of the Constitution of India.

I have considered the submissions made by the learned advocates for the parties. I have also perused the award in question made by the labour court. At page 38, internal page 6 of the impugned award, the labour court has taken into account the past record of the respondent. The labour court has considered that, ordinarily, misconduct of misappropriation cannot be tolerated. However, considering the clean past record of the workman wherein he has not committed such misconduct of misappropriation and also considering the fact that the workman has repaid the amount in question in the establishment of the petitioner, the labour court was of the view that some punishment is required to be imposed against the workman so that he can always remember the same in future and may not commit such misconduct twice and, therefore, the labour court imposed punishment as aforesaid while granting reinstatement without back wages for the intervening period. The labour court has also considered certain decisions of the apex court as well as this court. The labour court considered the decision of the apex court in SCOOTER INDIA LIMITED VERSUS LABOUR COURT, LUCKNOW reported in AIR 1989 SC 149. The labour court has also considered the decision in RM Parmar versus GEB reported in 23 GLR page 352 wherein principle has been laid down that in such type of cases also, the labour court can grant the relief when it is satisfied that the punishment of dismissal is harsh and unjustified though the alleged misconduct is found to be proved and not challenged by the workman but was admitted by the workman. Considering the proved and admitted misconduct of misappropriation committed by the workman in the compelling circumstances, the labour court considered

that if some punishment would be imposed while granting reinstatement without back wages, it would met ends of justice between the parties and, therefore, it imposed the punishment of stoppage of two increments with future effect while awarding reinstatement without back wages for the intervening period. I have considered these observations made by the labour court in the impugned award.

The law on this aspect is clear that in case of misappropriation, normally, the labour court cannot interfere and cannot grant relief in favour of the workman. However, the labour court has considered the family circumstances of the workman disclosed by him in his reply to the show cause notice dated 7th January, 1987 wherein, in terms, it was mentioned by the workman that because of the sickness of his wife and son, he was in dire need of the amount and the sickness of his wife had compelled him to use the amount and he used for a limited period and returned it back thereafter. In his reply to the show cause notice, he admitted that he had personally used the amount of Rs.1551.36 ps. belonging to the Corporation and he was prepared to deposit the same before the corporation. His reply to the show cause notice is very clearly disclosing his mental agony about the sickness of his wife and daughter. His daughter aged about two and half years at that time was suffering from paralysis and his wife was also sick during that time and such compelling circumstances led him to appropriate the amount of the corporation for some period. Such compelling circumstances had ultimately resulted into misappropriation. He also admitted the findings given by the Inquiry Officer in reply to the show cause notice and requested for showing mercy and not to pass the harsh order of dismissal against him since there is no other earning member in his family to look after his family. These compelling circumstances were considered by the labour court while considering the case of the workman under section 11A of the ID Act, 1947 while keeping in view his clean past record.

When the workman has committed any misconduct having adverse family circumstances which has ultimately resulted into misappropriation of the amount of the employer, then, definitely, it can be considered as a serious act of misappropriation of the funds of the employer. However, while considering the quantum of punishment for such proved and serious misconduct, competent authority is required to take into account the socio economic back ground of the employee, compelling circumstances which constrained him to commit such misconduct, family circumstances and length of service as

well as his past record. These aspects are required to be kept in mind by the competent authority before imposing the punishment against the workman. These aspects though brought to the notice of the competent authority, but not considered by the competent authority while passing the order of punishment and the labour court rightly considered these aspects while examining the matter under section 11A of the ID Act, 1947.

In SHANKAR DASS V. UNION OF INDIA [AIR 1985 SC 772], the apex court has considered the case of misconduct of misappropriation of the Govt.fund by the employee in similar circumstances. The observations made by the apex court in para 6 and 7 of the said judgment as well as para 1 are relevant and material and, therefore, para 6 and 7 of the said judgment are reproduced as under:

"6. The learned Magistrate First Class, Delhi, Shri Amba Prakash was gifted with more than ordinary understanding of law. Indeed he set an example worthy of emulation. Out of the total sum of Rs. 1,607.99 which was entrusted to the appellant as a Cash cleric, he deposited Rs. 1,107.99 only in the Central Cash Section of the Delhi Milk Scheme. Undoubtedly, he was guilty of criminal breach of trust and the learned Magistrate had no option but to convict him for that offence. But, it is to be admired that as long back as in 1963, when section 235 of the Code of Criminal Procedure was not on the Statute book and later refinements in the norms of sentencing were not even in embryo, the learned Magistrate gave close and anxious attention to the sentence which, in the circumstances of the case, could be passed on the appellant. He says in his judgment The appellant was a victim of adverse circumstances; his son died in February 1962, which was followed by another misfortune; his wife fell down from an upper storey and was seriously injured: it was then the turn of his daughter who fell seriously ill and that illness lasted for eight months. The learned Magistrate concluded his judgment thus:

"Misfortune dodged the accused for about a year... ..... and it seems that it was under the force of adverse circumstances that he held back the money in question. Shankar Dass is a middle aged man and it is obvious that it was under compelling circumstances that he could

not deposit the money in question in time. He is not a previous convict. Having regard to the circumstances of the case, I am of the opinion that he should be dealt with under the Probation of Offenders Act, 1958."

7. It is to be lamented that despite these observations of the learned Magistrate, the Government chose to dismiss the appellant in a huff, without applying its mind to the penalty which could appropriately be imposed upon him in so far as his service career was concerned. Clause (a) of the second proviso to Article 311 (2) of the Constitution confers on the Government the power to dismiss a person from service "on the ground of conduct which has led to his conviction on a criminal charge". But, that power, like every other power, has to be exercised fairly, justly and reasonably. Surely the Constitution does not contemplate that a Government servant who is convicted for parking his scooter in a nonparking area should be dismissed from service. He may, perhaps, not be entitled to be heard on the question of penalty since clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant or the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical."

In para 1 of the said judgment, it was observed by the apex court as under:

"1. Cases which evoke sympathy come frequently before the Courts. But, pity, not often. The case before us has a unique story to tell, the story of a crime committed under the stress of personal misery, compounded by the apathy of the Establishment and the appalling delays of law. Ironically, the silver lining is furnished by the bravery of a broken man who has been fighting against injustice for the last 23 years. When justice is done, or so the judges believe, the conscience is assuaged. But in this case, despite our doing all that can be done for the appellant within the framework of law, we

> have an uneasy conscience. Delay not only defeats justice and robs it of its immediate relevance to the parties but it shakes the very confidence of the people in the desire and ability of law courts to assist them when they need that assistance most."

In view of the above decision of the apex court wherein the apex court has considered the adverse family circumstances of an employee who has committed the misconduct of misappropriation and also in view of the peculiar and glaring facts of the present case, according to my opinion, when the workman had disclosed correct facts and/or adverse family circumstances leading to the commission of the misconduct of misappropriation of the funds for some short period and also in view of the past clean record of the workman, the labour court was justified in exercising the powers under section 11A of the ID Act, 1947 as a reformative measure since the workman had become victim of the circumstances. Considering the matter from the another angle namely reinstatement of the workman after the award made by the labour court, the workman is working now with the corporation since 1998 and has not committed any misconduct, according to my opinion, the award of reinstatement without back wages with punishment of stoppage of two annual increments for the intervening period does not call for interference of this court. Even Mr. Munshaw has also not submitted that subsequent to his reinstatement, the workman has committed any misconduct while working with the petitioner.

Therefore, considering the entire facts and circumstances of the case and also while keeping in mind two facts namely reply of the workman to the show cause notice dated 7th January, 1987 and that the workman is working with the petitioner since 1998 without any complaint, and also considering his past clean record, according to my opinion, the labour court has not committed any error in making the award in question. Therefore, according to my opinion, the labour court was right in appreciating and discussing the evidence on record and was also right in observing the conduct of the workman and was also justified in granting the reliefs in favour of the workman and, therefore, according to my opinion, there is no substance in the petition and, therefore, same is required to be dismissed.

In the result, this petition is dismissed. Rule is discharged. Interim relief shall stand vacated. There shall be no order as to costs.

(H.K. Rathod,J.)

Vyas